83-1804

Supreme Court, U.S.
FILED
MAR 20 1984
ALEXANDER L. STEVAS
CLERK

CASE NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 1983 TERM

DeWitt McDonald and
Ella Pearl McDonald,
Plaintiffs-Respondents,

-vs-

Sandusky Real Estate, Inc. dba
Real Estate One and
R.G. Holderness,
Defendants-Petitioners.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David R. Pheils, Jr.
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177
Attorney for Petitioners
Sandusky Real Estate, Inc.
and R.G. Holderness

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

This petition of Sandusky Real Estate, Inc. and R.G. Holderness, pursuant to Rule 21, Rules of the Supreme Court of the United States, respectfully shows as follows:

(a) QUESTIONS PRESENTED FOR REVIEW

I. Does discretion of a trial court to apportion damages and attorney fees among Defendants where there is neither allegations nor findings of any concert of action among the Defendants and where some of the Defendants have removed their assets to a distant state thereby making it likely that a joint and several judgment would fall exclusively or disproportionately on the remaining Defendants, promote

the objectives of Title 42, §§3601, 3604, and 1982?

II. Does a District Court have discretion to reduce claimed attorney fees under Title 42 USC §§3612 and 1988 when the trial court's familiarity with the legal and factual issues involved in the case leaves him with the firm conviction that such claimed fees are unjustified and where such claimed fees are incurred only to obtain damages and are so disproportionate to the relief obtained as to shock the conscience?

(b) LIST OF ALL PARTIES

1. DeWitt McDonald, Plaintiff-Respondent;

2. Ella McDonald, Plaintiff-Respondent;

3. Sandusky Real Estate, Inc. dba

Real Estate One, Defendant-Petitioner;

4. R. G. Holderness, Defendant-Petitioner;

5. Raymond L. Verble, Defendant-Respondent;

6. Bonnie G. Verble, Defendant-Respondent;

(c) TABLE OF CONTENTS

action among the Defendants and where some of the Defendants have removed their assets to a distant state thereby making it likely that a joint and several judgment would fall exclusively or disporportionately on the remaining Defendants, promote the objectives of Title 42, §§3601, 3604, and 1982? 17

II. Does a District Court have discretion to reduce claimed attorney fees under Title 42 USC §§3612 and 1988 when the trial court's familiarity with the legal and factual issues involved in the case leaves him with the firm conviction that such claimed fees are unjus-

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CASES:

(d) LOWER COURT OPINIONS REPORTED

(e) JURISDICTIONAL GROUNDS

The judgment sought to be reviewed was entered December 23, 1983 by the Sixth Circuit Court of Appeals and this Court has jurisdiction pursuant to 28 USC §1254.

(f) STATUTES INVOLVED

1) 42 USC §3601

It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.

2) 42 USC §3612(c)

(c) Injunctive relief and damages; limitation; court costs; attorney fees. The court may grant as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages, together with court costs and reasonable attorney fees in the case of a prevailing plaintiff:

Provided, That the said plaintiff in the opinion of the court is not financially able to assume said attorney's fees.

3) 42 USC §1982

Property rights of citizens. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

4) 42 USC §1988

Proceedings in vindication of civil rights. The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable

to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§1681 et seq.], or title VI of the Civil Rights Act

of 1964 [42 USCS §§2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(g) STATEMENT OF THE CASE

On or about July 15, 1975, Defendant-Petitioner Ralph Holderness, hereinafter called Holderness, contacted Defendants Verbles after seeing their advertisement for sale of the subject property to ask them to list their property with Defendant Sandusky Real Estate, Inc., hereinafter called Corporation. Such property was listed. Plaintiff DeWitt McDonald, hereinafter McDonald, never offered $27,500.00 for the subject until August 15, 1975 through Defendants Holderness and Corporation which offer was taken to Defendants Verbles by Holderness on the same day and rejected by Defendants Verbles.

McDonald and his wife filed this action on October 8, 1975, a temporary

restraining order was issued on October 9, 1975, and Holderness informed Plaintiffs on October 14, 1975 that Verbles had accepted their $27,500.00 offer. The property was then transferred to Plaintiffs.

The trial court, following a full trial on liability for damages, found that the actions of Verbles and Holderness did not constitute violations and dismissed the action at Defendants' costs. This was appealed by Plaintiffs solely on questions of law and reversed by the Sixth Circuit Court of Appeals on May 5, 1980 (Appendix 52) and "remanded for determination of damages, costs and attorney fees in favor of Plaintiffs."

The trial court conducted a hearing commencing on December 29, 1981, with evidence therein limited to costs and attorney fees as the trial court ruled any evidence of Plaintiffs' damages would have

to be found in the transcript of the original trial on liability and damages.

Plaintiffs' attorneys submitted affidavits indicating that all the attorney fees being claimed were incurred after Verbles had agreed to sell to Plaintiffs and were in fact incurred solely to prove and collect damages and attorney fees.

The trial court issued a memorandum, decision and judgment entry on October 5, 1981. (Appendix 46) All parties then moved the Court for reconsideration of the October 5, 1981 judgment. A hearing on such motions was held November 10, 1981 and on August 12, 1982 the trial court issued a memorandum and order. (Appendix 43) On August 16, 1982 the trial court issued its amended judgment (Appendix 41) in conformity with its memorandum and order.

Plaintiffs appealed such judgment to the Sixth Circuit Court of Appeals on

September 8, 1982. While such appeal was pending Plaintiffs filed a satisfaction of judgment as to the judgment against Defendants Verbles on March 30, 1983.

The Court of Appeals, after hearing, reversed and remanded ordering, inter alia, that the District Court impose joint and several liability upon all Defendants and that the District Court accept the Plaintiffs' hourly rates and total hours without regard to the amount of compensatory damages and unless Defendants introduced evidence that Plaintiffs had not spent the claimed hours or had not actually been charging the claimed hourly rates. (Appendix 34,39)

Plaintiffs' Complaint made no allegations of any concert of action by Defendants, conspiratorial or otherwise, but alleged only a lawful realtor-seller relationship and there was no finding of fact contained in the trial court's

findings as adopted in the Sixth Circuit opinion (Appendix 52) which found any such concert of action.

When Defendant Verble told Holderness that he preferred not to sell his property to blacks, Defendant Verble was required by Holderness to agree that the property would be shown to any interested purchaser and that if such purchaser was black and offered either the listing price of $29,500.00 or made the highest offer that Mr. Verble must sell the property to such black purchaser. (F.O.F. 12, Appendix 56) The Sixth Circuit, at page 13 of its May 5, 1980 opinion (Appendix 64) recognized that Holderness, "accurately informed Defendant Verble of the requirements of federal law banning racial discrimination in the sale of housing."

Holderness promptly conveyed every offer to purchase made by Plaintiffs to Defendants Verbles and there was no finding that Holderness ever advised

Defendants Verbles not to accept any of the offers made by Plaintiffs or in any other fashion induced, encouraged or participated in Defendants Verbles' refusal to sell to Plaintiffs. Plaintiff McDonald admitted that Holderness never refused to write up any offer which Plaintiffs made on the subject property. The only reason that Defendants Verbles rejected Plaintiffs McDonalds' offer of $27,500.00 was advice of their counsel not any advice by Holderness. (F.O.F. 33, Appendix 61)

Plaintiffs submitted claimed attorney hours through preparation for the hearing on attorney fees and costs of 388.5 hours: 153 hours for Attorney McCarter and 235.5 hours for Attorney Spater. In contrast Holderness had total attorney hours spent in his defense of 158.00 hours of which 95.15 hours spent through September 23, 1980 were for representation of both Holderness and the Corporation.

Defendants Verble's attorney had spent only 112.70 hours defending Defendants Verble.

The trial court found that "in the hours claimed by both counsel, there are inumerable incidents of both counsel claiming compensation for the same increment of time, which has the effect of doubling the cost to the defendants of the claimed for rate/hr" (Appendix 49) and "Herein, the alleged discrimination covered a period of five (5) days, three (3) days of trial, resulting in minimal compensatory damages. To allow $75.00/hr for all the hours claimed by both counsel would be morally unconscionable, where attorney fees could be approximately fifteen (15) times the damages recovered." (Appendix 33)

(i) BASIS OF JURISDICTION IN TRIAL COURT

The jurisdiction of the trial court was properly invoked by Plaintiffs under 28

USC §1343(4) and 42 USC §3612 for redress of violations of title 42 USC §§1982 and 3604.

(j) ARGUMENT

I. Does discretion of a trial court to apportion damages and attorney fees among Defendants where there is neither allegations nor findings of any concert of action among the Defendants and where some of the Defendants have removed their assets to a distant state thereby making it likely that a joint and several judgment would fall exclusively or disproportionately on the remaining Defendants, promote the objectives of Title 42, §§3601, 3604, and 1982?

The purpose of the Fair Housing Act (41 USC §§3601, et seq) and 42 USC §1982 is to prohibit all discrimination in the sale or

rental of housing based on race, color, etc., both private and public. District of Columbia v. Carter, 409 US 418 (1973); U.S. v. Henshaw Bros., Inc., 401 F.Supp. 399 (E.D.Va, 1974); Smith v. Woodhollow Apartments, 463 F.Supp 16 (W.D. Okla, 1978) However, for the sanctions provided in 42 USC §3612(c) to deter potential violators, there must be certainty that they cannot avoid answering in damages, in whole or equitably, for their knowing and deliberate violation of 42 USC §§3604 and 1982.

This Court has recognized the general public policy requiring even joint tort feasors to share equitably in the cost of reparation in Northwest Airlines, Inc. v. Transport Workers Union of America, 451 U.S. 77 (1981) wherein it said at page 81:

> "Recognition of the right reflects the view that when two or more persons share responsibility for a wrong, it is inequitable to require one to pay the entire cost of

> reparation, and it is sound policy to deter all wrongdoers by reducing the likelihood that any will entirely escape liability." (emphasis added)

The Seventh Circuit in Seaton vs. Sky Realty Co., 372 F.Supp. 1322 (N.D.ILL., 1972), affd. 491 F.2d 634 (7th Cir, 1974), held that a trial court does have such discretion to apportion.

In Dickson v. Yates, 188 N.W. 949 (Iowa, 1928) the requirements for concert are set forth at page 951:

> "The joint liability of wrongdoers in tort is a joint and several liability, but exist only where the wrong itself is joint. A mere similarity of design or conduct on the part of independent actors is not sufficient to constitute such actors joint tort-feasors. If it be severally done - that is independently - though for a similar purpose and even at the same time without any concert of action, they are several tort-feasors." (emphasis added)

The Plaintiffs' Complaint made no allegations of any concert of action between Defendants Verble and Holderness

nor was there any such finding by the trial court which findings were neither appealed by the Plaintiffs nor rejected by the Sixth Circuit. (May 5, 1980 Opinion, Appendix 52)

Because Defendants Verbles moved the bulk of their assets out of the State of Ohio, prior to 1982, imposition of a joint judgment against all the Defendants, whether compensatory, punitive or for costs and attorney's fees, results in imposing all or most of the liability upon Holderness because he lives in Ohio and has the bulk of his assets there where they are most easily executed against by the Plaintiffs.

Prohibiting a trial court the discretion to apportion damages allows and encourages multiple tort feasors to move their assets outside the state and argue for a joint and several judgment in hopes that, if successful, the plaintiff would execute the entire judgment against the

local defendants. Petitioners submit that such would result not only in the possibility of imposing excessive sanctions upon some of the tort feasors but, more importantly, in frustrating the entire purpose of Title 42 §§3601, 3604 and 1982 by allowing a culpable, and possibly the most culpable as here, Defendant to escape scot free. Surely the trial court had the power, if not the duty, to structure any judgment, including apportionment of damages, to prevent such a miscarriage of justice. That is what the trial court here did.

II. Does a District Court have discretion to reduce claimed attorney fees under Title 42 USC §§3612 and 1988 when the trial court's familiarity with the legal and factual issues involved in the case leaves him with the firm conviction that

such claimed fees are unjustified and where such claimed fees are incurred only to obtain damages and are so disproportionate to the relief obtained as to shock the conscience?

The disillusionment of many citizens and officials of the government with abuses of various civil rights statutes is common knowledge. Such abuses include not only frivolous and groundless suits but suits which are "worked" by legal counsel to generate huge and unnecessary attorney fees which are expected to be paid by the Defendants.

This problem has been recognized by many courts. The following statement from Adams v. Hempstead Health Co., 426 F.Supp. 1141 (E.D. N.Y. 1977), could have been written for the instant case:

> "It appears to the court that this was not a difficult or complex case. It involved no

> untested legal issues and, insofar as it related to plaintiff Adams, it presented a simple, straight-forward, factual exposition of Adams' single visit to the apartment house, his subsequent difficulty in finding housing, and the telephone calls and visits made by the 'testers' for Suffolk Housing Services. There did not then, nor does there now, seem to be a need for having two attorneys present at the trial of this case. Id at 1143 (emphasis added)

The court in Boe v. Colello, 447 F.Supp. 607 (S.D.Wy, 1978) could also have been speaking of this case when it said at page 610:

> "This Court's experience, both at the bench and bar over extended years, qualifies it to estimate the time reasonably required by plaintiffs' claims in terms of research, analysis and drafting of various documents. Moreover, the Court's own research, study and analysis of the respective contentions of the parties further afford some yardstick by which to measure plaintiffs' attorney's allegations of the time factor. Any expenditure of time beyond that which is reasonably required suggests either inexperience and devotion of more time than

> warranted to fairly and properly present claims or, alternatively, that the attorneys, however experienced, engaged in dilettantism; a losing side is not required to pay for such indulgences." (emphasis added)

See also: Cruz v. Beto, 453 F.Supp. 905 (S.D. Tex. 1977). The court then went on to conclude that the hours claimed by those plaintiffs' attorney were much beyond those reasonably necessitated to advance the plaintiffs' constitutional claims. Such is exactly the situation here!

Two different attorneys, one from Toledo and one from Columbus, Ohio, worked on this case for Plaintiffs. Toledo Attorney McCarter claims to have logged 153 hours while Columbus Attorney Spater claims 235.5 hours.

Counsels' affidavits show that Attorney Spater was brought into this case seven months after suit was filed. No reasonable explanation has been given as

to why a second attorney was required, nor why it was necessary to engage an attorney from a city which is over 150 miles from the courthouse.

The Trial Court made clear its view of the complexity and risk, or lack thereof, during the hearing on December 29, 1980 in this case:

> "They taked about how you computed the lawyers' fees and how you computed the rates and factors you consider, but I will repeat again, this case is not Northcross. This is one man, one or two party, three party simple civil rights case, and it was not complex, not risky and has to be considered in that light." (emphasis added)

and

> "I am not going to let him answer the question. I sat through the trial with you and there were no tricky legal issues and it was a simple fact situation, and you can't build that item up in your case." (emphasis added)

In its memorandum and judgment of October 5, 1981 (Appendix 46) the District Court found:

> "In the hours claimed by both counsel, there are inumerable incidents of both counsel claiming compensation for the same increment of time, which has the effect of doubling the cost to the defendants of the claimed rate/hr."

and;

> "Herein, the alleged discrimination covered a period of five (5) days, three (3) days of trial, resulting in minimal compensatory damages. To allow $75.00/hr for all the hours claimed by both counsel would be morally unconscionable, where attorney fees could be approximately fifteen (15) times the damages recovered."

and commented

> "It is significant that the testimony on attorney's fees generated 100 more pages of transcript that the trial in chief."

To permit an award of attorney fees as demanded by Plaintiffs' counsel would be contrary to the purpose of awarding attorney fees which, as stated by the Sixth Circuit in Northcross v. Brd. of Ed., 611 F.2d 624 (6th Cir, 1979) cert

den. 447 U.S. 911 (1980) is:

> "To make an award of fees which is 'adequate to attract competent counsel,' but which
>
> do not produce windfalls to attorneys." 611 F.2d at 633."

Petitioners maintain that the fees requested by Plaintiffs and virtually directed by the Sixth Circuit would produce such a windfall. Prior to remand from the Court of Appeals, this case only involved:

1. Three depositions taken by Plaintiffs;

2. Testimony of six witnesses called by Plaintiffs during the trial, three of whom were the Plaintiffs and their attorney;

3. Twelve trial exhibits offered into evidence by Plaintiffs;

4. Less than two full trial days; and

5. An appeal only on issues of law.

Plaintiffs' attorneys spent 2 1/2 times the hours spent by Defendant's counsel. A brief review of Plaintiffs' counsels'

affidavits shows some of the reason for Plaintiffs' counsels' excessive hours: at least 18 hours spent by Attorney McCarter in meetings and communications with Attorney Spater; at least 97.25 hours spent by Attorney Spater in meetings and communications with Attorney McCarter, travel time between Toledo and Columbus and preparation and sitting at trials at which Attorney McCarter was already present. This total of 115.25 hours is over 29% of the total hours claimed by Plaintiffs' counsel although the trial court only discounted "the claimed hours by 25% for duplication and unnecessary acti ity. (October 5, 1981, Memorandum and Judgment, Appendix 50)

This case should not have required Defendants' counsel to expend the hours they did but such hours were required only because of the excessive and unnecessary "stirring of the pot" by Plaintiffs' attorneys with massive discovery designed

solely to manufacture injury to Plaintiffs which did not exist. As Plaintiffs' own witness, Mr. Willging, admitted in his testimony, what was complex about this case was showing damages. What he should have said is that it gets very complex when a Plaintiff tries to create injury to justify damages where there is none.

Plaintifffs' counsel obviously spent more time on the case than was reasonably necessary. Defendants should not be required to pay for such indulgence. Boe v. Colello, 447 F.Supp. 607, 610 (S.D. N.Y. 1978); Planned Parenthood v. Citizens, 558 F.2d 861 (8th Cir, 1977). The words of the Court in Adams, supra, are again appropos to the instant matter:

> "If a straight 'hours expended' approach were to be adopted in cases such as this, the result would be to grant a 'blank check' to the plaintiffs' attorneys. *** A simple case such as this, involving no novel questions of law, having no significant ramifications for the public, and resulting

> merely in damages to the complaining party, cannot merit an attorney's fee equal to what might be appropriate in a complex case involving novel questions of law and having widespread ramifications for the public." 426 F.Supp. at 1143

The District Court was and is in the best position to properly evaluate the reasonableness and necessity of the rates and hours claimed by Plaintiffs' counsel. If attorneys can abuse the system, as in this action, public confidence in and support for judicial redress of civil rights violations will erode to the point where, as a practical matter, necessary remedies for valid claims will be jeopardized.

Other circuits have held that the degree of success, including damages suffered is a factor which can be considered in determining the amount of attorney fees to be assessed. Jones v. MacMillan Bloedel Containers, Inc., 685 F.2d 236 (8th Cir, 1982); Jones v.

Diamond, 594 F.2d 997 (5th Cir, 1979); Souza v. Southworth, 564 F.2d 609 (1st Cir, 1977) This conflict should be resolved by this Court.

David R. Pheils, Jr.
Attorney for
Defendants-Petitioners

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the above Petition for Writ of Certiorari were served upon Alexander M. Spater, 723 Oak Street, Columbus, Ohio 43205, telephone (614)221-1160 and C. Thomas McCarter, 420 Gardner Building, Toledo, Ohio 43604, telephone (419) 225-9100 as attorneys for Plaintiffs-Respondents DeWitt and Ella McDonald and upon Leonard J. Catri, 165 Washington Row, Sandusky, Ohio 44870, telephone (419) 625-8735 attorney for Defendants-Respondents Raymond L. and Bonnie G. Verble by despositing copies in the United States Post Office, postage prepaid to such counsel at said addresses.

David R. Pheils, Jr.
410 Louisiana Avenue
Perrysburg, Ohio 43551
(419) 874-3177
Attorney for
Defendants-Petitioners

APPENDIX

NO. 82-3568

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEWITT McDONALD; ELLA PEARL McDONALD,

Plaintiff-Appellants,

-vs-

SANDUSKY REAL ESTATE, INC., d/b/a
REAL ESTATE ONE; R.G. HOLDERNESS,

Defendant-Appellees.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF OHIO

BEFORE: LIVELY, Chief Circuit Judge,
KRUPANSKY, Circuit Judge, and
COOK, District Judge*
Filed December 23, 1983

PER CURIAM. Plaintiffs-Appellants, Dewitt and Ella Pearl McDonald, appeal from the district court's award of damages and attorneys' fees in this housing discrimination case.

This case is before the Court for the second time. In McDonald v. Verble, 622 F.2d 1227 (6th Cir. 1980), this Court reversed the district court's holding that defendants, the sellers of an apartment building, their real estate agent, and the realty company, did not violate federal statutes (42 U.S.C. §§1982 and 3601 (1976) by refusing to sell the real estate to the plaintiffs because they are black. The Court remanded this case to the district court for determination of damages, costs, and attorneys' fees.

On remand, the district court awarded plaintiffs $928.00 in compensatory damages, $1000.00 in punitive damages and approximately $11,000.00 in attorneys' fees against the defendants jointly and severally. The parties moved for reconsideration and the lower court amended its order, apportioning the damages and imposing several liability. Plaintiffs appeal.

I. Apportionment of Liability

The apportionment of liability is improper as a matter of law. Appellants suffered a single, indivisible injury as a result of defendants' concurrent actions. It is implausible that damages resulting from such an injury could be divided among individual defendants. On remand, the district court is hereby directed to impose joint and several liability upon defendants.

II. Compensatory Damages

The district court awarded compensatory damages of $928.20 representing the total out-of-pocket expenses found by the court to have been incurred by the plaintiffs in pursuing their housing discrimination claim. The court did not order any damages for mental suffering "in the absence of any medical causative testimony" and failed to assess damages for the plaintiffs' loss of their civil

rights.

It should be noted that review of the district court's opinion on the damages issue was made more difficult by the court's failure to state the facts and reasons upon which it based its award. On remand, the district court "shall find the facts specifically and state separately its conclusions of law thereon," as required by Fed.R.Civ.P. 52(a).

In any event, we find the district court's award in error. Citizens who have suffered racial discrimination are entitled to damages for inconvenience, humiliation, mental anguish, embarassment, mental distress, and loss of their civil rights. See Seaton v. Sky Realty Co., 491 F.2d 634 (7th Cir. 1974). Humiliation can be inferred from the circumstances as well as established by the testimony. Id. at 636.

The district court thus erred by requiring plaintiffs to introduce medical

testimony in order to recover damages for mental suffering and by failing to award damages for loss of plaintiffs' civil rights. On remand, the district court is directed to assess damages for out-of-pocket expenses, inconvenience, humiliation, mental anguish, embarassment, mental distress, and loss of civil rights, as supported by the circumstances of the case and the testimony offered by the plaintiffs.

III. Punitive Damages

The district court awarded plaintiffs the $1,000 in punitive damages provided by the Fair Housing ACt, 42 U.S.C. §3612(c) (1976). Because the court did not specifically set forth its findings of fact and conclusions of law in its award of punitive damages is reversed and remanded for recalculation in light of the numerous constitutional and statutory violations italicized in McDonald I, 622 F.2d at

1228-32, and pursuant to the standard in Rule 52(a). In addition, the district court should not apply the $1,000 limitation on punitive damages provided in §3612. Where, as here, defendants violated both §3612 and 42 U.S.C. §1982, which has no limit on such damages. McDonald I, 622 F.2d at 1234.

IV. Attorneys' Fees

The district court found that because the case was "in no way of the significance of Northcross v. Board of Education of Memphis City Schools, generated "minimal" compensatory damages, and involved duplicated efforts by plaintiffs' two attorneys, McCarter and Spater, it would allow $40 per hour for Mr. McCarter and $30 per hour for Mr. Spater, and would discount the claimed hours by 25% for duplication of efforts. These conclusions are clearly erroneous and do not meet the standard set by Rule 52(a) for fact-findings. The award of

attorneys' fees is thus reversed and remanded to the district court for reconsideration pursuant to the following directions.

The case providing the standard for an attorneys' fees award in this circuit, Northcross v. Board of Education, 611 F.2d 624 (6th Cir. 1979) cert. denied, 447 U.S. 911 (1980), is applicable to all civil rights cases, including housing discrimination cases. Kinney v. Rothchild, 678 F.2d 658 (6th Cir. 1982). The district court should therefore award attorneys' fees according to the standards set by Northcross.

The district court's order of attorneys' fees is erroneous in four respects. First, the judge did not make the fact-findings required by Northcross and Rule 52(a) to reduce the hours claimed by plaintiffs. Second, plaintiffs introduced substantial evidence supporting the

attorneys' hourly rates and total hours claimed. The court should not disregard this evidence in the absence of any evidence introduced by defendants contrary to plaintiffs' claimed hours and hourly rates. Third, the court's reduction of the attorneys' fees award in light of the "minimal" compensatory damages involved in this case was clearly erroneous. The amount of compensatory damages awarded by the district court does not determine the attorneys' fees award. Johnson v. Snyder, 6 39 F.2d 316 (6th Cir. 1981) ($1 damages, $8,600 attorneys' fees). To award attorneys' fees based on the compensatory damages award would discourage attorneys from taking these often difficult, unpopular, and time-consuming cases. Finally, the testimony introduced by plaintiffs shows that the only duplication of effort by their two attorneys occurred at trial and the damages hearing, which both attorneys attended. Such evidence

does not support a 25% reduction for duplication of efforts.

Accordingly, IT IS ORDERED that the decision of the district court in this case is REVERSED and REMANDED for further proceedings in accordance with this Opinion.

ISSUED AS MANDATE: January 16, 1984

COSTS: (To be recovered by the appellants)

FEES:	$ 50.00
PRINTING:	$1,023.60
TOTAL:	$1,073.60

*Honorable Julian A. Cook, United States District Judge for the Easter District of Michigan sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEWITT MCDONALD, et al.,

Plaintiff,

-vs-

RAYMOND L. VERBLE, et al.,

Defendant.

No. C-75-405

JUDGMENT ENTRY
August 16, 1982

Judgment order of October 5, 1981 is vacated and amended as follows: the damages to be paid to the Plaintiffs: compensatory damages to be paid by Defendant Ralph Holderness $234.05, by Defendant Sandusky Real Estate One, Inc., the sum of $234.05, by Defendant Raymond L. Verble the sum of $234.05, by Defendant Bonnie G. Verble the sum of $234.05;

Punitive damages to be paid by Defendant Ralph Holderness in the sum of $334.00, by Defendant Raymond L. Verble the sum of $333.00 by Defendant Bonnie G. Verble the sum of $333.00.

C Thomas McCarter's attorney's fees against Defendant Ralph Holderness in the sum of $1,197.50, against Defendant Real Estate One, Inc. the sum of $1,197.50, against Defendant Raymond L. Verble the sum of $1,197.50 and against Defendant Bonnie G. Verble the sum of $1,197.50. Alexander Spater's attorney's fees against

Defendant Ralph Holderness in the sum of $1,692.58, against Defendant Real Estate One, Inc., in the sum of $1,692.58, against Defendant Raymond L. Verble in the sum of $1,692.58, and against Defendant Bonnie G. Verble in the sum of $1,692.50.

/s/Nicholas J. Walinski
U.S. District Judge

Judgment of August 16, 1982

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEWITT MCDONALD,
et al.,

Plaintiff,

-vs-

RAYMOND L. VERBLE,
et al.,

Defendant.

No. C 75-405

MEMORANDUM and ORDER

Filed August 12, 1982

WALINSKI, J:

This cause is before the Court on motions of both plaintiffs and defendants

for reconsideration of the judgment entered October 5, 1981. Hearing were held November 10, 1981. Since this was an individual simple discrimination case, the high fees set in Northcross v. Board of Education of Memphis City Schools, 611 F. 2d 264 (6th Cir. 1979) are not appropriate.

Accordingly, the Court will amend the October 5, 1981 judgment and allocate the damages as follows:

1 - Compensatory Damages:

a) $234.05 to be paid by Ralph Holderness

b) $234.05 to be paid by Sandusky Real Estate, Inc.

c) $234.05 to be paid by Raymond L. Verble

d) $234.05 to be paid by Bonnie G. Verble

2 - Punitive Damages:

a) $334.00 against Ralph Holderness

b) $333.00 against Raymond L. Verble

c) $333.00 against Bonnie G. Verble

3 - McCarter Attorney Fees:

a) $1,197.50 against Ralph Holderness

b) $1,197.50 against Sandusky Real Estate, Inc.

c) $1,197.50 against Raymond L. Verble

d) $1,197.50 against Bonnie G. Verble

4 - Spater Attorney Fees:

a) $1,692.58 against Ralph Holderness

b) $1,692.58 against Sandusky Real Estate, Inc.

c) $1,692.58 against Raymond L. Verble

d) $1,692.58 against Bonnie G. Verble

IT IS SO ORDERED.

/S/ NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Toledo, Ohio

August 12, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

DEWITT McDONALD, et al.,

Plaintiffs,

-vs-

RAYMOND L. VERBLE, et al.,

Defendants.

No. C 75-405

MEMORANDUM and JUDGMENT
October 5, 1981

WALINSKI, J.:

This cause is before the Court on remand from the Sixth Circuit Court of Appeals for an assessment of damages and an award of attorney's fees and the defendant's opposition thereto.

The issue is made complex by the fact that the trial in chief was not bifurcated as to the issues of liability and damages, and the evidence adduced therein on damages was minimal.

The Court set a hearing on damages and attorney's fees on December 29, 1980, but the defendants objected to reopening the evidence on damages, and the hearing proceeded as a hearing on costs and attorney fees. It is significant that the testimony on attorney's fees generated 100 more pages of transcript that the trial in chief.

Accordingly, the Court has sifted through the trial transcript to seek out items of compensatory damages. The search is made complex by the fact that neither the plaintiffs nor the defendants offered any documentation either for or against damages.

The Court finds that the plaintiffs made five (5) trips to Toledo from Sandusky, Ohio, including trial, incurring travel expenses and losing work; two (2) trips to Columbus, Ohio from Sandusky, seeking counsel, and one (1) trip to Cleveland, Ohio for the same purpose. In

the latter trip, although probable, no mileage, meals or other expenses were testified to.

Therefore, the Court finds the following:

5 trips to Toledo including trial wages:

Wages: 5 days x 8 hrs x 10.00/hr = $400.00

Mileage: 120 miles x .18/mile = $108.00

Room: 1 night at 41.00 = $40.00

Meals: 5 days x $20/day = $100.00

2 trips to Columbus

Wages: 2 days x 8 hrs x 10.00/hr = $160.00

Mileage: 220 miles x .18/mile = $79.20

Meals: 2 days x $20/day = $40.00

for a total of $928.20 as compensatory damages.

In view of the tenor of the Sixth Circuit's comment in the remand order, the

Court will grant the plaintiffs the $1000.00 provided in the Fair Housing Acts Sec. 36 12.

Mrs. Ella McDonald fainted in the course of her testimony at the damages hearing but in the absence of any medical causative testimony, the Court must find that the incident was the result of an ongoing illness.

The matter of attorney's fees raises many problems. C. Thomas McCarter, the complaint filing counsel, because he was involved in the TRO and consummation of the sale, found it necessary to become a witness and thereafter brought in Alexander Spater as trial counsel.

In the hours claimed by both counsel, there are inumerable incidents of both counsel claiming compensation for the same increment of time, which has the effect of doubling the cost to the defendant of the claimed rate/hr.

This case is in no way of the

significance of Northcross v. Board of Education of Memphis City Schools, 611 F. 2d 629 (6th Cir. 1979). There, the litigation covered many years, involved many novel issues, and vindicatd the civil rights in the field of education of the entire black population of Memphis, Tennessee.

Herein, the alleged discrimination covered a period of five (5) days, three (3) days of trial, resulting in minimal compensatory damages. To allow $75.00/hr for all the hours claimed by both counsel would be morally unconscionable, where attorney fees could be approximately fifteen (15) times the damages recovered.

Therefore, the Court will allow $40.00/hr to Mr. McCarter, $35.00/hr to Mr. Spater, and discount the claimed hours by 25% for duplication and unnecessary activity.

Therefore, the Court will allow to Mr.

McCarter 75% of 153.00 hours, or 119.75 hours at $40.00/hr or $4790.00.

The Court will allow to Mr. Spater 75% of 235.50 hours or 196.58 hours at $35.00/hr or $6780.30.

Accordingly, the Court will award to plaintiffs $928.20 as compensatory damages as against Sandusky Real Estate, Inc. d/b/a/ Real Estate One, and $1000.00 in punitive damages to be paid by Raymond L. Verble and R. G. Holderness eqally.

The Court will further award to C. Thomas McCarter $4790.00 and Alexander Spater $6780.30 as attorney's fees, to be paid equally by all three (3) defendants.

The Court further awards to plaintiffs their costs of suit and appeal as taxed by the Court.

IT IS SO ORDERED.

/S/ NICHOLAS J. WALINSKI
UNITED STATES DISTRICT JUDGE

Toledo, Ohio

October 1, 1981.

No. 78-3127

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEWITT and ELLA MCDONALD,
Plaintiffs-Appellants,

v.

RAYMOND L. and BONNIE G. VERBLE, et al.
Defendants-Appellees.

APPEAL from the United States District Court for the Northern District of Ohio, Western Division.

Decided and Filed May 5, 1980.

Before: EDWARDS, Chief Judge, LIVELY, Circuit Judge and PHILLIPS, Senior Circuit Judge.

EDWARDS, Chief Judge. The question in this case is whether the Federal Civil Rights and Fair Housing laws, 42 U.S.C. § 1982 (1976) and 42 U.S.C. § 3601 *et seq.* (1976) require owners and realtors engaged in selling housing to avoid both blatant and subtle racial discrimination in their sales efforts. It is clear to this court that the practices found by the District Judge in his careful findings of fact could be said not to have done egregious damage to the plaintiffs. This is particularly true since in the end they did succeed in purchasing the property at issue at a price comparable to that at which it had been offered previously to a prospective white buyer.

The District Judge did not disregard the nondiscrimination requirements of the statute and the Constitution. On the contrary, it was the District Judge's timely issuance of a Temporary Restraining Order which accomplished the sale.

This record contains the District Judge's findings of fact which we print nearly in their entirety. These detail with sensitivity the discriminatory variations from the prohibition on racial discrimination which we find in the law. The parties to this appeal do not dispute these findings. It is their legal effect which is at issue.

We believe, however, that the prohibition on racial discrimination contained in the applicable statutes (and underlying constitutional principles) is absolute. We hold that contrary to the judgment entered by the District Court dismissing plaintiffs' complaint with costs to the defendants, this case must be remanded to the District Judge after vacation of the judgment for the consideration of damages and the award to plaintiffs of costs and attorneys' fees.

We have italicized the specific findings which we hold demonstrate statutory and constitutional violations.

Findings of Fact

1) Plaintiffs, DeWitt and Ella McDonald, husband and wife, are black citizens of the United States who have been residents of Sandusky, Ohio, for the past seventeen (17) years.

2) Defendants, Raymond L. and Bonnie G. Verble, are white citizens of the United States who presently live in Tennessee, and who in July of 1975 resided in Castalia, Ohio, and were the owners of the property located at 2131, 2135, 2137 and 2139 Parkview-McArthur Park, Sandusky, Ohio (hereinafter McArthur Park property). The McArthur Park property is a four-unit rental complex with each comprised of a two-bedroom apartment. The Verbles owned said property, which is located in an area occupied predominantly by white families, for approximately ten years prior to 1975.

3) Defendant, Sandusky Real Estate One, Inc., is a real estate brokerage firm doing business in Sandusky, Ohio.

4) Defendant, Ralph G. Holderness, is a real estate agent licensed by the State of Ohio, who is employed as general manager of Sandusky Real Estate One, Inc.

5) In early July, 1975, the Verbles began efforts to sell the McArthur Park property by advertising the property in the Sandusky Register.

6) On or about July 3, 1975, in response to an ad placed by Defendant Verbles in the July 1, 1975 Sandusky Register, Ella McDonald called the Verbles and inquired as to the property, including the purchase price. *Ella McDonald was informed that the purchase price was $26,500,* and an appointment was made for the McDonalds to see the property on the day of her initial inquiry concerning the McArthur Park property.

7) That evening the McDonalds met Raymond Verble at the McArthur Park property and observed the exterior of the residence and the inside of two apartments. At this time DeWitt McDonald indicated to Raymond Verble that he was interested in purchasing the property. Mr. Verble told Mr. McDonald to call him at home later on that evening to discuss the matter further. Mr. Verble indicated that he did not wish to discuss the matter in the presence of another gentleman who was with him at that time. Mr. Verble said that he would be going out of town for approximately a week.

8) Later that evening DeWitt McDonald called the Verble residence and was informed by Bonnie Verble that her husband was not home yet. Mr. McDonald informed her that he had called pursuant to her husband's request, that he was interested in buying the McArthur Park property, and that he wanted to talk to Mr. Verble before Mr. Verble left town. *Mr. McDonald did not receive a return phone call from the Verbles.*

9) On Sunday, July 6, 1975, Ella McDonald called the Verble residence to inquire as to the status of the property and was informed by Raymond Verble that two men were going to purchase the property. Ella McDon-

ald informed Mr. Verble that they were interested in purchasing the property and requested Mr. Verble to call them if the two men he referred to were not able to secure financing. *The plaintiffs did not hear again from the Verbles.*

10) *The McDonalds observed that the newspaper advertisement for the sale of the McArthur Park property continued to appear in the Sandusky Register on Tuesday, July 8 and Wednesday, July 9, 1975.* Thereafter, Plaintiff DeWitt McDonald contacted Gerry Owens, who is a white resident of Castalia, Ohio, and who has been a friend of DeWitt McDonald's for a considerable time. The purpose of Mr. McDonald's contact with Gerry Owens was to seek his assistance in purchasing the McArthur Park property and to ascertain whether or not the Verbles were discriminating against him in the purchase of the property on account of his race or color. Mr. McDonald asked Mr. Owens to call the owners of the property and to make an appointment to see the McArthur Park property and to submit an offer to purchase for said premises.

11) Defendant Ralph Holderness contacted the Verbles on July 15, 1975, after seeing their ad in the Sandusky Register, to determine if the Verbles would list their property with Real Estate One. A Listing Agreement was signed by the Verbles on that date. The Listing Agreement gave Real Estate One the exclusive right to sell the property for Twenty Nine Thousand Five Hundred (29,500) Dollars, with a ten percent (10%) commission to the real estate broker. At the time the Listing Agreement was executed, Mr. Verble told Mr. Holderness that the "Hurak brothers" had indicated an interest in the property. Accordingly, Mr. Holderness agreed that the Huraks would be excluded from the Listing Agreement until August 1, 1975, and that if the property was sold to the Huraks on or before August 1, 1975, Mr. Holderness would not receive a commission. *The Verbles did not tell Mr. Holderness that they*

had talked with Mr. McDonald or that Mr. McDonald was interested in the McArthur Park property.

12) *During the conversation between Mr. Verble and Mr. Holderness on July 15th regarding the Listing Agreement, Mr. Verble told Mr. Holderness that he preferred not to sell the property to blacks.* Mr. Holderness then told Mr. Verble that he would have to show the property to any interested purchaser, and that he would have to sell to a black if a black offered $29,500, or made the highest offer. Mr. Holderness testified that Mr. Verble agreed to these conditions when he entered into the Listing Agreement.

13) During the conversation between Mr. Verble and Mr. Holderness on July 15th regarding the Listing Agreement, Gerry Owens called the Verble residence and inquired whether the property was still for sale. Mr. Verble indicated that it was, and Mr. Owens then said that he wanted to see the property. Mr. Verble told him that he would call him to set up an appointment. Mr. Verble then gave Mr. Owens' name and number to Mr. Holderness, and Mr. Holderness called Mr. Owens the next day to set up an appointment.

14) Thereafter, Mr. Owens went to the office of Real Estate One and was shown the property owned by the Verbles on Parkview Drive by a sales associate of Mr. Holderness. Mr. Holderness called Mr. Owens the following day to see whether Mr. Owens was interested in purchasing the property. Mr. Owens then contacted Mr. McDonald, who advised him to stall, as he was going on vacation. . . .

15) Mr. Holderness testified that his usual practice was to get as much money for the seller of the property as possible; that if there were two offers on the property, one of which was lower than the other, he would try to get the offeror who had submitted the lower bid to submit a higher offer. He also testified that if a prospective purchaser submitted an offer, he would tell other persons who were interested in the property that an offer had

been submitted; he would take down their phone number; and he would call them if the prior offer fell through.

16) Mr. Holderness testified that if a customer inquired about property in a particular section of Sandusky, he would try to give the customer as many listings in that area as he could. . . .

17) On July 24, 1975, DeWitt McDonald went to the offices of Real Estate One to inquire about the status of the McArthur Park property. He met with Defendant Holderness. Mr. McDonald told Mr. Holderness that he was interested in purchasing some investment property. According to the testimony of Mr. McDonald, *Mr. Holderness informed Mr. McDonald of a number of properties which were suitable for purchase for investment reasons, but he did not mention the McArthur Park property*. Plaintiff McDonald inquired a number of times whether there was any property for sale in McArthur Park. *Defendant Holderness initially insisted that there was not*. After persistent inquiries by the plaintiff, *Defendant Holderness informed him that there was a piece of property for sale* in the McArthur Park area, but the property was *located on Forest Drive*. Mr. McDonald then specifically asked Defendant Holderness if there was any property for sale on the Parkview Drive part of McArthur Park. *After Defendant Holderness had several times denied that such property was for sale, he finally indicated that the McArthur Park property was for sale, but that he was interested in purchasing the property for himself*. Mr. Holderness testified at trial that he had considered purchasing the McArthur Park property, but upon inquiry learned that financing was not available.

18) After Mr. Holderness indicated that the McArthur Park property was for sale, Mr. McDonald told him that he wanted to purchase the property. Mr. Holderness asked him whether he wished to view the premises and the method of financing that he would use to buy the property. Mr. McDonald informed Mr.

Holderness that he did not need to see the property; that if it was good enough for Mr. Holderness, it was good enough for him. He instructed Mr. Holderness to prepare an offer to purchase.

19) Mr. Holderness informed Plaintiff DeWitt McDonald that the purchase price was $29,500. Mr. McDonald, in a written offer to purchase dated July 24, 1975, offered to purchase the McArthur Park property for $26,500. Both plaintiffs signed the offer to purchase. They also deposited a check for $50 as earnest money with Mr. Holderness. The McDonald's offer to purchase was to remain in effect until July 28, 1975.

20) There are several disputes in the testimony as to what transpired between Mr. Holderness and Gerry Owens after DeWitt McDonald executed his offer to purchase on July 24, 1975.

Owens testified that Holderness called him and told him that the owners had a buyer, but that the owners did not want to sell to that party, and that the owners might take less than the list price. Owens further testified that after Holderness' call he talked to DeWitt McDonald, who told him to offer $25,500 for the property. Owens testified that he then went into Holderness' office for the purpose of making an offer of $25,500, but that Holderness told him he could not take an offer for $25,500. *Owens testified that Holderness told him the Verbles might take an offer of $27,500 because they had just refused an offer for a little less from someone they did not want to sell to.* Mr. Owens also testified that in the course of a general discussion of investment property, Mr. Holderness told him that if one bought property in a "colored area" the value of the property would suffer.

Owens testified that he then left and conferred with DeWitt McDonald, who told him not to offer more than $27,500 and gave him $50 earnest money. *According to Owens' testimony he executed an offer to purchase the property for $27,500 at approximately 11:00 A.M. on July 28, and Holderness informed him at approximately 4:00*

P.M. the same day that the offer had been accepted by the Verbles.

Holderness testified that it was his recollection that Owens came into his office on July 26th, and that he returned on July 28 and executed an offer to purchase for $27,500. Holderness did not offer testimony to dispute Mr. Owens' testimony about what was discussed between the two regarding the other prospective buyer. Regarding Owens' testimony about Holderness' comments about purchasing property in "colored areas", Holderness testified that he used the words "depressed areas", and did not equate depressed areas with "colored areas."

21) Mr. Holderness testified that he took DeWitt McDonald's offer dated July 24th to the Verbles on that date, and that the Verbles stated they wanted to think about it. However, Mr. Verble testified that Holderness brought the offers for $26,500 and $27,500 to him on the same day.

22) It is undisputed that when Mr. Holderness took Mr. Owens' offer to the Verbles on July 28, 1975, Mr. Verble asked Mr. Holderness whether he would cut his commission from 10% to 7% if he accepted the offer for $27,500. Mr. Holderness so agreed.

23) *Raymond and Bonnie Verble signed the Acceptance Form on the bottom of Gerry Owens' offer to purchase on July 28th. The Verbles rejected the McDonald offer of July 24th on July 28th also.*

24) Mr. Holderness thereafter called Mr. McDonald and told him that his offer of July 24, 1975, for $26,500 had been rejected. *Mr. Holderness admitted on cross examination that after Mr. Owens placed his offer for $27,500, he did not contact DeWitt McDonald to inform him of the offer or encourage him to "up" his own bid.*

25) After the McDonalds were informed that their offer of $26,500 had been rejected, they contacted the NAACP in Sandusky. They then met with Mr. Houston

of the NAACP, who indicated that he would investigate the matter.

26) Mr. Houston contacted the defendants concerning plaintiffs' claims of discrimination on August 1, 1975. Mr. Holderness, in a letter dated August 4, 1975, informed Mr. Houston that if the present purchaser of the property was unable to complete the transaction, the Verbles were willing to sell the property to the McDonalds for $27,500. . . .

• • •

28) Gerry Owens testified that Mr. Holderness discussed financing with him several times, both before and after July 28, 1975. According to Owens' testimony, Mr. Holderness told Owens that the owners might be able to help with financing the purchase.

29) On August 11, 1975, Gerry Owens informed Mr. Holderness that he was withdrawing his offer to purchase the property. Mr. Holderness called DeWitt McDonald the same day and informed him that the other offer had fallen through.

30) On August 12, 1975, DeWitt and Ella McDonald submitted an offer to purchase the McArthur Park property for $26,500. The McDonalds placed $50 down as earnest money.

31) Mr. Holderness submitted the McDonalds' offer to purchase for $26,500, dated August 12th, to the Verbles. Mrs. Verble testified that she called their attorney, Mr. Ferwin, regarding the offer, ... The Verbles thereafter rejected the McDonalds' offer to purchase for $26,500, and Mr. Holderness so informed the plaintiffs.

32) *On August 15, 1975, the McDonalds went to the office of Real Estate One and executed an offer to purchase the Verbles' property for $27,500. Mr. Holderness took the offer to purchase to the Verbles on the same day, and the Verbles rejected the offer on that date. Mr. Verble then stated that they would not sell the property*

for anything less than $29,500, and that unless he got that price, he would take the property off the market.

33) *At trial Mr. Verble testified that the only reason that he rejected the McDonald's offer of $27,500 on August 15th was "advice of counsel." Mr. Verble did not indicate what the advice of cousel was.*

34) Mr. Verble testified at trial that the only offers he ever got for the property were those of Mr. Owens and Mr. McDonald, although others did view the property.

35) Plaintiffs filed this action on October 8, 1975. They alleged that the defendants had refused to sell them the McArthur Park property for racially discriminatory reasons. *On October 9, 1975, this Court entered a temporary restraining order restraining the defendants from conveying the McArthur Park property to any persons other than the plaintiffs.*

36) By letter dated October 14, 1975, Mr. Holderness informed the plaintiffs that the Verbles, through their attorney John Kerwin, had withdraw their rejection of plaintiff's offer to purchase and had accepted said offer to purchase for $27,500.

37) After negotiations between the parties, through counsel, the McDonalds and the Verbles executed a Purchase Agreement on November 28, 1975. The plaintiffs took possession of the property on February 1, 1976.

• • •

39) *DeWitt McDonald and Ella McDonald testified that they were upset, embarrassed and humiliated by the actions of the defendants, which they perceived to be based on race.*

40) On August 15, 1975, when plaintiffs matched the offer of $27,500 of Gerry Owens, there was no conceded reduction of the 10% commission called for by the listing agreement, ...

• • •

On these findings which we accept as valid, the District Judge surprisingly concluded that the complaint "should be and hereby is dismissed at plaintiffs' cost." His rationale for doing so is set forth in two brief paragraphs:

> Although negotiations went forward with reluctance on the part of the defendants, no denial of sale or making unavailable the subject property occurred, nor was there any discrimination in the terms, conditions or privileges of sale, as proscribed by 42 U.S.C. § 3604, subsections (A) and (B).
>
> Although Defendant Holderness was reluctant to disclose the availability of the subject property, the availability was known to the plaintiffs, and their offer, through Gerry Owens, was part of the negotiating process and constitutes no violation of 42 U.S.C. § 3604, subsection (D).

Our review of the District Judge's conclusions against the detailed findings of fact which precede them convinces us that both the spirit and the letter of the federal statutes dealing with fair housing were repeatedly violated by both defendants Verble and Holderness, that the violations were not cured by the ultimate transfer of this property to plaintiffs, and that the judgment previously entered in this case must be vacated and the case remanded for determination of damages and costs in favor of plaintiffs.

Since 1866, when Congress sought to spell out the civil rights of the newly freed slaves, federal law has recognized the right to purchase and own a house as a fundamental part of American citizenship.

> **§ 1982. Property rights of citizens**
>
> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (1976).

Since 1968 federal law has also provided:

> **§ 3604. Discrimination in the sale or rental of housing**
>
> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.
>
> (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.
>
> (d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.
>
> (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.

42 U.S.C. § 3604 (1976).

As to defendant Dewitt Verble, his initial indication that "he preferred not to sell the property to blacks" was effectively implemented when the Verbles rejected the McDonalds' offer

of $27,500 on August 15, 1975 although the Verbles had previously wanted to sell to a white buyer at the same figure. The District Judge noted and apparently relied upon the fact that at Verble's suggestion, Holderness agreed to reduce his commission by 3% which would have increased the Verbles' net by $825. There is no indication, however, that in rejecting the McDonald offer, Verble and Holderness ever discussed a similar commission reduction.

The fact that subsequent to the filing of a lawsuit, the sale of the property was consummated with the McDonalds, does not alter the prior discriminatory conduct. Nor does that fact wipe out the need for consideration of damages. Much less does it serve to justify the award of costs to the offending parties on this record and against the McDonalds who were the offended parties.

As to defendant Holderness, we observe that at his entrance into this series of negotiations, he accurately informed defendant Verble of the requirements of federal law banning racial discrimination in the sale of housing. Yet later he failed to tell the McDonalds of the listing of the Verbles' property until forced to do so and still later he clearly made available information to a white prospect which he had not made available to a willing black buyer.

We read these actions as violative of the letter and spirit of 42 U.S.C. § 3604(a), (b) and (d).

Twelve years ago, just before § 3604 was enacted, the Supreme Court pointed out in *Jones* v. *Alfred H. Mayer Co.*:

> [T]his Court recognized long ago that, whatever else they may have encompassed, the badges and incidents of slavery—its "burdens and disabilities"—included restraints upon "those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Civil Rights Cases*, 109 U. S. 3, 22. Just as the Black Codes, enacted after the Civil War to restrict the free exercise of those rights, were substitutes

> for the slave system, so the exclusion of Negroes from white communities became a substitute for the Black Codes. And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.
>
> Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom—freedom to "go and come at pleasure" and to "buy and sell when they please"—would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. *At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.* (Emphasis supplied).

Jones v. *Alfred H. Mayer Co.*, 392 U.S. 409, 441-443 (1968) (footnotes omitted).

Relying upon the Thirteenth Amendment and the 1866 Civil Rights Act, 42 U.S.C. § 1982 (1976), the Supreme Court held that there was a federal cause of action against private parties for racial discrimination in the sale or rental of housing.[1]

One year later in 1969, after the enactment of § 3604,[2] the Supreme Court reiterated its commitment to these principles in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 235-236 (1969).

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[1] This Court has recently cited and relied on *Jones* in ordering relief for the discriminatory closing of a thoroughfare in Memphis, Tennessee, holding that a barrier barring traffic at the boundary between a black and white residential district was a "badge of slavery." *Greene* v. *City of Memphis*, 610 F.2d 395 (6th Cir. 1979).

[2] Section 3604 was not, however, directly applicable to the events involved in *Sullivan* v. *Little Hunting Park, Inc.*, since those events took place before its enactment.

The Eighth Circuit has spelled out still further the implications of the Supreme Court holdings:

> Recent cases make clear that the statutes prohibit all forms of discrimination, sophisticated as well as simpleminded, and thus disparity of treatment between whites and blacks, burdensome application procedures, and tactics of delay, hindrance, and special treatment must receive short shrift from the courts. *See* United States v. Pelzer Realty Company, Inc., 484 F.2d 438 (5th Cir. 1973); United States v. Youritan Construction Company, 370 F.Supp. 643 (N.D.Cal., filed Feb. 8, 1973); Hall v. Freitas, 343 F.Supp. 1099 (N.D.Cal. 1972); Newbern v. Lake Lorelei, Inc., 308 F.Supp. 407 (S.D.Ohio 1968); Brown v. Lo Duca, 307 F.Supp. 102 (E.D.Wis. 1969).

Williams v. *Matthews Co.*, 499 F.2d 819, 828 (8th Cir.), *cert. denied*, 419 U.S. 1021 and 1027 (1974).

Although the Fair Housing Act's enforcement section, § 3612, limits relief beyond actual damages, court costs and reasonable attorney fees to $1,000 punitive damages, the courts have read this statute in conjunction with the older § 1982, and the recent § 1988 which impose no such limitations.

In *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229 (1969), the Supreme Court also discussed the remedies available for violations of the civil rights statutes:

> . . . Congress, by 28 U. S. C. § 1343(4), created federal jurisdiction for "damages or . . . equitable or other relief under any Act of Congress providing for the protection of civil rights . . . "
>
> • • •
>
> The existence of a statutory right implies the existence of all necessary and appropriate remedies. . . .
>
> Compensatory damages for deprivation of a federal right are governed by federal standards, as provided by Congress in 42 U. S. C. § 1988, which states:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said court in the trial and disposition of the cause . . . ."
>
> This means, as we read § 1988, that both federal and state rules on damages may be utilized, whichever better serves the policies expressed in the federal statutes. Cf. *Brazier* v. *Cherry*, 293 F. 2d 401. The rule of damages, whether drawn from federal or state sources, is a federal rule responsive to the need whenever a federal right is impaired.

Sullivan v. *Little Hunting Park, Inc.*, 396 U.S. at 238-40 (1969). *See also, Rogers* v. *Loether*, 467 F.2d 1110, 1112 (7th Cir. 1972), aff'd sub nom. *Curtis* v. *Loether*, 415 U.S. 189 (1975); *Parker* v. *Shonfeld*, 409 F.Supp. 876, 879-881 (N. D. Cal. 1976); and the 1976 Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1976).

The judgment of the District Court is vacated, and the case is remanded for determination of damages, costs and attorney fees in favor of plaintiffs.

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Office Supreme Court, U.S.
FILED
MAY 24 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1804

In the Supreme Court of the United States

October Term, 1983

SANDUSKY REAL ESTATE, INC.,
d/b/a REAL ESTATE ONE, *et al.*,
Petitioners,

vs.

DEWITT and ELLA McDONALD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the Sixth Circuit Court of Appeals erred in reversing the district court by holding that the judgments for Respondents against Petitioners for damages, attorneys' fees and costs should be joint and several.

(2) Whether the Sixth Circuit Court of Appeals erred in reversing and remanding the district court's judgment and order as to Respondents' counsel's hourly rate and reduction of hours with instructions that the district court comply with the requirements of the Sixth Circuit Court of Appeals' decision in *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980).

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No. 83-1804

In the Supreme Court of the United States

October Term, 1983

SANDUSKY REAL ESTATE, INC.,
d/b/a REAL ESTATE ONE, *et al.*,
Petitioners,

vs.

DEWITT and ELLA McDONALD,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

OPINION BELOW

The opinion from the Sixth Circuit Court of Appeals from which review is sought was entered December 23, 1983 (Pet. App. pp. 22-27).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The substantive facts surrounding Respondents' claims which gave rise to this litigation and their claims of racial discrimination by Petitioners in their attempts to negotiate for and purchase property in violation of 42 U.S.C. §§1982 and 3601, *et seq.*, are set forth in *McDonald v. Verble*, 622 F.2d 1227 (6th Cir. 1980) (Pet. App. pp. 35-50).

The district court's dismissal of Respondents' claims with Respondents to bear Petitioners' costs was vacated and remanded to the district court for a determination of damages, of costs and attorneys' fees in favor of the Respondents after the Court of Appeals found that the record established ". . . that both the spirit and the letter of the federal statutes dealing with fair housing were repeatedly violated by both defendants. . .". 622 F.2d at 1232.

Thereafter on remand Respondents presented evidence as to damages and the reasonableness of their requested attorneys' fees and costs through the testimony of Respondents and Attorneys Phillips and Willging practicing attorneys in the Toledo, Lucas County area. Petitioners failed to present any evidence at said evidentiary hearing in opposition to Respondents' counsel's requested hourly rates or hours requested for compensation. Thereafter the district court issued its memorandum, decision and judgment entry on Respondents' damages, attorneys' fees and costs on October 5, 1981 (Pet. App. pp. 30-34) which was subsequently amended pursuant to cross motions for reconsideration of the parties on August 16, 1982 in the form of an amended judgment by the district court (Pet. App. pp. 27-28).

Respondents perfected their timely appeal from said judgments and during the pendency of said appeal settled all claims which they had with Defendants Verbles.

Oral arguments were held on Respondents' second appeal before the Sixth Circuit on October 23, 1983 which were attended by Petitioner Holderness and his counsel. After said argument Petitioner Holderness concluded that their position on appeal was in trouble and on October 30, 1983 he conveyed interest in the properties which he had in Ohio and Michigan to his wife. On February 7, 1984 Respondents sought leave to amend their complaint to set aside said conveyances as fraudulent in violation of §§1336.01, *et seq.*, of the Ohio Revised Code (Resp. App. p. A1).

On December 23, 1983 the Sixth Circuit Court of Appeals ordered that the district court's judgments on Respondents' damages, attorneys' fees and costs be reversed and that the matter be remanded to the district court with instructions that the district court assess additional compensatory and punitive damages for Respondents and that as to Respondents' counsel's attorneys' fees and costs that the district court enter their findings of fact as required by the Sixth Circuit's decision in *Northcross v. Board of Education of Memphis City Schools, supra.* The Court of Appeals found that as to Respondents' claimed attorneys' fees and costs that the district court had erred in four respects in that he had: (1) failed to make specific findings of fact required to reduce the hours claimed by Respondents' counsel; (2) disregarded Respondents' evidence as to their hourly rates and total hours claimed without contra evidence presented by Petitioners; (3) erred in concluding that Respondents' attorneys' fees should be reduced because of minimal compensatory damages entered in favor of Respondents; and (4) erred in reducing by twenty-five percent Respondents' attorneys' fees for alleged duplication of efforts.

REASONS FOR DENYING CERTIORARI

(A) The Court of Appeals properly ruled Petitioners jointly and severally liable for Respondents' damages, attorneys' fees and costs.

Petitioners argue that it was improper for the Court of Appeals to reverse the district court's individual assessment of damages among the various defendants because there was no "concert of action" among the defendants and that such joint and several liability would work a hardship upon Petitioners in this case.

The Court of Appeals noted in Appeal I in this case that Petitioner Holderness had after properly apprising the owners of the obligation to show the property to all interested purchasers, thereafter engaged in numerous and repeated violations of the fair housing laws which were italicized by the Court in its opinion. It is clear that under the fair housing laws Petitioner Real Estate One is liable for the actions of its broker-salesman, Petitioner Holderness, and likewise Petitioner Holderness becoming the sales agent acting on behalf of defendants Verbles is equally responsible for their actions as well as his own. In addition it is equally clear that the duty not to discriminate is non-delegable. See, *Marr v. Rife*, 503 F.2d 735 (6th Cir. 1974); *U.S. v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973); *U.S. v. Northside Realty Associates, Inc.*, 474 F.2d 1165 (5th Cir. 1973); *Seaton v. Sky Realty Co.*, 372 F. Supp. 1322 (N.D. Ill. 1972), *aff'd.*, 491 F.2d 634 (7th Cir. 1974); *U.S. v. Youritan Construction Co.*, 370 F. Supp. 643 (N.D. Ca.), *aff'd.*, 509 F.2d 623 (9th Cir. 1975); *Harrison v. Otto G. Heinzroth Mortgage Co.*, 430 F. Supp. 893 (N.D. Ohio 1977).

Petitioners have acknowledged in their briefs below that the applicable basis for determining individual or joint and several liability is to be derived from State law. They further acknowledged that the controlling Ohio case on liability of joint tort feasors is set forth in *Larson v. Cleveland Railway Co.*, 142 Ohio St. 20 (1943). That case sets forth the "concert of action" standards for imposition of liability among tort feasors in light of their relationships and the facts of the case. Relying upon the law of the State of Ohio as applied to the facts of the case the Court of Appeals in Appeal II found that as a matter of law the district court's apportionment of liability was improper and that joint and several liability should be imposed.

Petitioners' reliance upon the Court's decision in *Northwest Airlines, Inc. v. Transport Workers*, 551 U.S. 77 (1981) is misplaced. The decision of this Court in *Northwest* was that an employer subject to back pay liability for violations of the Equal Pay Act, 29 U.S.C. §206 (d) and Title VII of the Civil Rights Act of 1966, 42 U.S.C. §§2000e, *et seq.*, have no statutory or common law right to contribution from unions allegedly responsible for the violations. It should be pointed out that the issue arose when a female cabin attendant commenced a class action suit against the airlines for violations of said Act. Petitioner ultimately was awarded damages for herself and the class she represented in excess of $20,000,000.00 in back pay, damages and interest against the airline. Petitioner sought no claim against the union. The airlines brought the union in as a non-allied party under Rule 19(a) of the Federal Rules of Civil Procedure. It was only after judgment against them that the airlines sought contribution from the union. In the instant case brought pursuant to the fair housing laws Petitioners could have cross-claimed against defendants Verbles or sought contribution from the pri-

mary tort feasor but chose not to do so. In a case with similar fact patterns to those presented in the instant case it was found the real estate agent who assisted his principal, the owners of the property, in racially motivated rejections of offers to purchase was liable as a joint tort feasor. *Dillon v. AFBIC Development Corp.*, 597 F.2d 556, 562 (5th Cir. 1979).

Petitioners' assertion that Respondents are precluded from joint and several liability because of their failure to plead a conspiracy or concert of action among the Petitioners is equally misplaced. Such a determination of "concert of action" is factual in nature pursuant to the dictates of *Larson* and not a matter of pleading.

Furthermore, Petitioners' assertion that to assess joint and several liability would result in inequity in that Petitioners would be required to satisfy the brunt of the judgments against the various defendants is equally unpersuasive. Again, Petitioners could have cross-claimed and/or sought contribution from defendants Verbles and they chose not to do so. The fact that defendants Verbles may have moved their assets out of State would not have precluded Petitioners from obtaining judgments against defendants Verbles and seeking to have said judgments given full faith and credit by another State upon which execution could be had or they could have sought pursuant to Ohio's prejudgment attachments statute, §§2715.01, *et seq.*, of the Ohio Revised Code, to prevent such assets from being conveyed and chose not to do so. In fact the evidence in this case reveals that after oral arguments on Appeal II Petitioner Holderness sought to fraudulently divest himself of assets from which any judgment could be satisfied by Respondents.

(B) It was not error for the Court of Appeals to reverse and remand the district court's judgment as to Respondents' counsel's attorneys' fees in light of the fact they were the prevailing party and introduced uncontradicted evidence as to the reasonableness of their hourly rate and hours claimed.

Petitioners contend that the Court of Appeals erred in reversing the district court's decision when in its discretion it reduced Respondents' counsel's attorneys' fees because said attorneys' fees were disproportionate to the relief which was obtained by Respondents. Petitioners' arguments do not accurately set forth the Court of Appeals' decision nor are they supported by this Court's recent decisions in *Hensley v. Eckerhart,* ..... U.S. ....., 51 U.S. L.W. 4552 (1983) and *Blum v. Stenson,* ..... U.S. ....., 52 U.S.L.W. 4377 (1984) and the Sixth Circuit's controlling decision in this area as set forth in *Northcross v. Board of Education of Memphis City Schools, supra.*

Respondents in this case were represented initially by Mr. McCarter, then approximately seven months after the institution of the lawsuit Mr. Spater was brought in as co-counsel. Mr. McCarter, in his affidavit filed in support of his attorney's fees, requested hourly compensation from 1976 to 1979 at a rate of $60.00 per hour and from 1980 to 1981 at a rate of $75.00 per hour. Mr. Spater requested compensation from 1976 through 1978 at a rate of $60.00 per hour, $70.00 per hour from 1978 through 1979, and $75.00 per hour from 1980 to 1981. The district court for no reason other than the fact that this case in its opinion was "an individual, simple discrimination case" where the attorneys' fees sought were fifteen times the damages recovered reduced Mr. McCarter's hourly rate to

$40.00 per hour and Mr. Spater's hourly rate to $35.00 an hour and then discounted twenty-five percent of the hours claimed for "duplication and unnecessary activity" with no further explanation or findings (Pet. App. pp. 41-51).

The Court of Appeals reversed and remanded the district court's judgment as to Respondents' counsel's attorneys' fees with instruction that the district court correct its judgment which was erroneous in four areas. The district court was instructed to enter a finding of fact as required by *Northcross* and Rule 52(a) of the Federal Rules of Civil Procedure as to why counsel's hours claimed were reduced by the district court. This aspect of the Court of Appeals' instructions is proper as this Court has stated in *Hensley* and reaffirmed in *Blum* that the initial estimate of reasonable attorney's fees under §1988 is properly calculated by multiplying the number of hours reasonably spent times a reasonable hourly rate with the party seeking the award required to submit some evidence supporting the hours worked and the rates claimed. 51 U.S.L.W. at 4554. In addition, *Northcross* dictates that "[A] fee calculated in terms of hours of service provided is the fairest and most manageable approach" in determining attorney's fees and that the district court may only cut hours claimed "for duplication, padding, or frivolous claims", but if hours are cut the court must "identify those hours and articulate its reasons for their elimination" with it being impermissible, however, to eliminate wholesale the services of attorneys without identifying the particular services which are regarded as duplicative. 611 F.2d 636-637. Thus, it was entirely proper for the Court of Appeals to instruct the district court that if in its discretion it reduced Respondents' counsel's hourly rate and hours claimed that it enter specific findings of fact as to the reasons why and the hours that were reduced.

The Court of Appeals further instructed on remand that the district court was not to reduce Respondents' counsel's fees in absence of evidence introduced by the Petitioners contrary to the claimed hours and hourly rates. In this case Petitioners introduced absolutely no evidence that Respondents' counsel's hours or hourly rate were improper. Respondents' counsel on the other hand in addition to their affidavits presented testimony in the form of expert witnesses, Dan Phillips, a long standing respected member of the defense bar in the Toledo, Lucas County, Ohio area, and Thomas Willging, an experienced civil rights attorney and law school faculty member, who testified that Respondents' counsel's hours were reasonable, the hourly rate was proper and the hours claimed were proper and reflected the market value for services rendered by attorneys with Respondents' counsel's expertise in the field and length of time in practice. Such testimony was not contradicted nor challenged by Petitioners. Thus, as in *Blum*, Petitioners should not be heard herein to challenge the hours claimed or hourly rates charged by Respondents as being unreasonable when they introduced no evidence contra. 52 U.S.L.W. at 4378.

The Court of Appeals also instructed on a related basis that the district court should not reduce Respondents' counsel's attorneys' fees by twenty-five percent for duplication of effort where the only evidence of such duplication which the record supports is that said counsel appeared together at the trial and at the damage hearings. In fact the record in this case reflects that Respondents' counsel made a conscientious effort not to duplicate time by handling separate aspects of discovery, preparing and examining separate witnesses at trial, and drafting and arguing separate aspects of the issues presented on the appeals. Furthermore, Petitioners have, throughout the

course of the proceedings for which the attorneys' fees are challenged, been themselves represented by two counsel. Petitioners' allegation that Respondents' counsel spent two and a half times the hours spent by Petitioners' counsel is both inaccurate and unpersuasive. The record in this case reflects that many of the hours spent in this case were not documented by Petitioners' counsel and indeed the hours spent by Attorney Scheidel for Real Estate One were not even submitted. Again, both Phillips and Willging testified that Respondents' counsel's hours did not appear to include any duplication of effort. Even if there had been evidence of duplication of effort by Respondents' counsel, which there was not, *Northcross* instructs that the district court may take this factor into consideration by reducing "some small percentage" of the total hours claimed. 611 F.2d at 637.

The Court of Appeals' final instruction on remand was that in assessing attorneys' fees the district court should not consider the amount of compensatory damages in determining the attorneys' fee award. This is clearly the state of the law as enunciated by this Court in *Hensley* where it was repeatedly emphasized that the crucial factor in determining attorney's fees under §1988 was ". . . the degree of success obtained". 51 U.S.L.W. at 4555. There can be no question that Respondents are "the prevailing party" in this action and have succeeded though it has taken two appeals, in prevailing under all claims and for all relief which was sought in their initial complaint. As was emphasized in *Hensley*:

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation, and indeed in some cases of exceptional success an enhanced award may be justified. *Id.*, at p. 4555.

This effectuates the purpose of §1988 by assuring effective access to the judicial process for all persons with civil rights grievances. *Id.*, at 4553. The Sixth Circuit in applying *Northcross* has consistently emphasized that the amount of damages obtained by the plaintiff does not control the amount of the attorney's fees. As the Sixth Circuit Court of Appeals stated in *Kinney v. Rothchild*, 678 F.2d 658, 660 (6th Cir. 1982):

> We see no reason for an exception here. The purpose of Section 1988 is to encourage lawyers to accept civil rights cases in which damages may be small, nominal or nonexistent. *Northcross* has the effect of guaranteeing that a lawyer will be awarded fees for all of his hours reasonably spent in presenting the issues on which his side prevails. Greatly reduced fees, such as were awarded in this case, will discourage lawyers from accepting housing discrimination cases and vindicating the rights Congress had in mind. Another reason for following *Northcross* is the need for contingency in determining attorney's fees.

See, *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d at 633.

A reduction of Respondents' counsel's attorneys' fees premised upon an argument that this was a simple case which did not affect the rights of numerous individuals is equally unpersuasive. In *Blum* this Court emphasized that in calculating attorney's fees under §1988 the number of persons benefited by the result should not be a consideration in calculating fees 52 U.S.L.W. at 4381, n.16. *Northcross* has also been applied as the standard by which district courts should exercise their discretion in awarding attorney's fees under §1988 and has been held applicable to relatively simple employment discrimination cases

brought by one plaintiff. *Horace v. City of Pontiac,* 624 F.2d 765 (6th Cir. 1980). Respondents, however, disagree that this was a relatively simple case which did not affect numerous individuals. This case was filed in 1979 and was the first fair housing case ever tried to the district court at a time when neither that court nor the Sixth Circuit Court of Appeals had set standards for fair housing cases. The two appeals in this case have resulted in not only Respondents achieving the relief which they sought but in the enunciation of standards which are to be a guide for determination of the validity of claims under the fair housing laws in the Sixth Circuit and its district courts. Furthermore, as Respondents' experts testify in light of the "contingency" nature of the attorney's fees in these types of cases it would have been difficult, if not impossible, for Respondents to have obtained in the Toledo, Lucas County area competent counsel who were willing to undertake such a risky and unpopular case other than Mr. McCarter and Mr. Spater. It is for this reason that Respondents have sought and still seek an upward adjustment of twenty-five percent of their attorneys' fees in this case which has been held to be proper under §1988 where the success obtained is "exceptional". See *Blum v. Stenson,* 52 U.S.L.W. at 4380; *Northcross v. Board of Education of Memphis City Schools,* 611 F.2d at 638.

The cases cited by Petitioners in their brief are unpersuasive in that they do not encompass this Court's standards for the procedure to determine nor standards to be adhered to in awarding attorney's fees under §1988 as enunciated in *Hensley* and *Blum* nor the Sixth Circuit's guiding decision in *Northcross.* Furthermore it should be emphasized as Mr. Justice Brennan noted in his opinion in *Hensley,* concurring in part and dissenting in part, that appeals as to the reasonableness of attorney's fees in civil rights cases greatly increase the costs to plaintiffs of

vindicating their rights, and thus frustrate the purposes of §1988. 51 U.S.L.W. at 4557. Such frustration is evidenced in this case in that despite proceeding through trial, two appeals and now of posing a petition for certiorari to this Court, Respondents' counsel have not received one cent of money from Petitioners for their attorneys' fees related to perfecting Respondents' claims and indeed the issue of the reasonableness of an amount of their attorneys' fees is still unresolved without the benefit of a final judgment upon which they may act. The district court in this case knew and Respondents feel confident that this Court recognizes that such delays certainly discourage as much as any other consideration counsel from desiring to take civil rights cases. This has the effect, as the Court warned in 1968 in its decision in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-443 (1968), of rendering our laws against discrimination to be "a mere paper guarantee."

CONCLUSION

Respondents respectfully request that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Excerpt From Transcript of Deposition of Petitioner Holderness

(Taken on January 31, 1984)

[49] Q. Now, you've told us that you transferred your interest to the property in Michigan and in your house in Perryburg after the arguments down in Cincinnati on advice of counsel; do you recall that testimony? A. Yes.

Q. And you can't recall why it was that this occurred after those arguments down in Cincinnati; did your counsel tell you that the arguments had gone badly? A. I just could see that when I was there.

Q. You could see that those arguments weren't going well for your side, correct? A. I observed that, yes.